UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:

Eugene Head,

Debtor.
_____/

Case No. 02-41776
Chapter 11
Hon. Phillip J. Shefferly

Eugene Head,

Plaintiff,

vs.

Adv. No. 04-4183

Farm Bureau General Insurance Company of Michigan, a Michigan Insurance Company, Mortgage Electronic Registration Systems, Inc., representing Countrywide Home Loans, Inc., a New York corporation, Kaye Financial Corporation, a Michigan corporation, and Alliance Funding Company, a division of Superior Bank, S.F.B., a conservatorship of the Federal Deposit Insurance Corporation,

Defendants,

and

Newport Insurance Company,

Intervening Defendant.
_____/

___OPINION DENYING DEFENDANT FARM BUREAU INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

I.

This matter is before the Court upon a complaint filed by Eugene Head, a debtor in a Chapter 11 case, seeking the recovery of certain insurance proceeds from Farm Bureau General Insurance Company of Michigan ("Farm Bureau") and seeking various other relief against Farm Bureau and other defendants in this adversary proceeding. Farm Bureau filed a motion for summary judgment

under Fed. R. Bankr. P. 7056(b). A hearing was held on June 3, 2005. The Court took the motion for summary judgment under advisement. The Court has jurisdiction pursuant to 28 U.S.C. § 1334(b) and § 157(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(E) and (O). For the reasons set forth in this opinion, Farm Bureau's motion for summary judgment is denied.

II.

Eugene Head ("Debtor") is the Debtor in this Chapter 11 case. At the time the Debtor filed his petition for relief under Chapter 11, he owned a number of rental properties. One of those rental properties was a home located at 20246 Danbury, Detroit, Michigan ("Danbury Property"). On March 27, 2000, the Debtor granted a mortgage on the Danbury Property to Mortgage Electronic Registration Systems, Inc. ("MERS") to secure a mortgage loan of $35,000. On February 26, 2003, a foreclosure sale was held with respect to the mortgage and MERS was the successful bidder. On March 5, 2003, the sheriff executed a deed on the mortgage sale to MERS (MERS' Ex. C.). The sheriff's deed provides that the applicable "redemption period shall be six months from the date of such sale." The redemption period from the foreclosure sale extended until August 26, 2003.

Farm Bureau issued a "dwelling package" insurance policy ("Policy") for the Danbury Property. Although the date of the original Policy is not clear, there was a "renewal" of the Policy issued on February 5, 2003 with an "effective date" of March 22, 2003 and a "policy period" of March 22, 2003 to March 22, 2004. The Policy limit for the Danbury Property was $70,000.

On August 15, 2003, a fire occurred at the Danbury Property. According to the Debtor's affidavit filed on March 31, 2005, the Debtor obtained the assistance of Jesse J. Lamb, Jr., a public adjuster, to assist in the preparation of a claim for insurance benefits because of the fire loss. On August 27, 2003, the Debtor submitted a Sworn Statement in Proof of Loss ("Proof of Loss"). The

Proof of Loss stated that the fire occurred on August 15, 2003 and, at the time the fire occurred, the Debtor was the "owner" of the Danbury Property and no other persons or entities were disclosed as having an interest in the Danbury Property at that time. The Proof of Loss claimed a loss of $69,128.87. Farm Bureau did not pay the Debtor's claim of loss. The Debtor filed a complaint in this adversary proceeding against Farm Bureau on February 11, 2004, seeking a judgment for the insurance proceeds for the fire loss.

Farm Bureau filed a motion for summary judgment requesting the Court to declare the Policy void and deny the Debtor's claim. Farm Bureau relies upon the following clause in the Policy:

> 3. Concealment or Fraud
>
> The entire policy will be void if, whether before or after a loss, one or more persons insured under this policy have:
>
> a. intentionally concealed or misrepresented any material fact or circumstance;
> b. engaged in fraudulent conduct; or
> c. made false statements;
>
> relating to this insurance or to a loss to which this insurance applies.

Farm Bureau argues that the Proof of Loss submitted by the Debtor violated this clause and, therefore, the Policy is void. According to Farm Bureau, the Policy is void pursuant to clauses 3(a), (b) and/or (c) of the Policy because of three separate statements contained in the Proof of Loss. First, Farm Bureau points to paragraph 3 of the Proof of Loss which is entitled "TITLE & INTEREST." That paragraph reads as follows:

> AT THE TIME OF LOSS THE INTEREST OF YOUR INSURED IN THE PROPERTY DESCRIBED THEREIN WAS OWNER. NO OTHER PERSON OR ENTITY HAD AN INTEREST THEREIN OR INSUMBRANCE [SIC] THEREON, EXCEPT: _____.

(Def.'s Br., Ex. B.) Next, Farm Bureau points to paragraph 4 of the Proof of Loss entitled "Changes." That paragraph reads as follows:

SINCE THE ABOVE POLICY WAS ISSUED THERE HAS BEEN NO CHANGER [SIC] IN TITLE, USE OR POSSESSION OF SAID PROPERTY EXCEPT: NONE.

(Id.)

Farm Bureau argues that: (i) at the time of the fire loss on August 15, 2003, the Debtor was not the owner of the Danbury Property; (ii) another entity did have an interest in the Danbury Property at that time; and (iii) since the date the Policy was issued, there had been a change in the title of the Danbury Property because of the foreclosure sale and the execution of the sheriff's deed. Farm Bureau argues that each of these three statements contained in these two paragraphs of the Proof of Loss, signed and sworn to by the Debtor, render the Policy void under clauses 3(a), (b) or (c) of the Policy. The Debtor contends that these three statements contained in paragraphs 3 and 4 of the Proof of Loss were not false. But even if they were not completely accurate, the Debtor argues that he did not make those statements with any intent to mislead or defraud Farm Bureau and, therefore, they do not render the Policy void under any of clauses 3(a), (b) or (c).

Farm Bureau filed a brief in support of its motion for summary judgment supported by an affidavit of William Butler, an employee of G-M Adjusting Company, which was the adjuster engaged by Farm Bureau with respect to the Debtor's claim. The Debtor filed a brief in opposition to the motion for summary judgment supported by an affidavit of the Debtor. Further, on the date of the hearing on June 3, 2005, the Debtor filed a second affidavit of the Debtor. Although Farm Bureau's motion for summary judgment requested relief only with respect to the complaint filed against it by the Debtor, MERS also filed a response to the motion for summary judgment requesting that the motion be denied. That response also indicates that it was filed on behalf of Countrywide Home Loans, Inc. and Newport Insurance Company, each of whom are also defendants in this adversary proceeding.

III.

Fed. R. Civ. P. 56(c) for summary judgment is incorporated into Fed. R. Bankr. P. 7056(c). Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-48. A "genuine" issue is one where no reasonable fact-finder could return a judgment in favor of the non-moving party. Berryman v. Reiger, 150 F.2d 561, 566 (6th Cir. 1998) (citing Anderson, 447 U.S. at 248).

IV.

Determination of Farm Bureau's motion for summary judgment requires the application of Michigan substantive law to the clause in the Policy on which Farm Bureau relies. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Michigan courts narrowly construe forfeiture provisions like clause 3 in the Policy.

> It is a firmly established rule of construction that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer and will never be extended beyond the strict words of the policy. The court will never seek for a construction of a forfeiture clause in a policy which will sustain it, if one which will defeat it is reasonably deducible from the terms and words used to express it.

Bernadich v. Bernadich, 283 N.W. 5, 7 (Mich. 1938) (internal quotation marks and citations omitted).

Farm Bureau contends that three statements contained in paragraphs 3 and 4 of the Proof of Loss violate clauses 3(a), (b), and (c) of the Policy. The first statement is that the Debtor was not the owner of the Danbury Property. However, that statement was true when made. Farm Bureau is

wrong as a matter of law when it asserts that the Debtor was not the owner of the Danbury Property as indicated on the Proof of Loss. The fire loss took place on August 15, 2003. That was after the date of the foreclosure sale, but prior to the time that the redemption period expired. Under Michigan law, the Debtor was still the owner of the property at that time. Upon a foreclosure sale, the "person making the sale shall forthwith execute, acknowledge, and deliver, to [the] purchaser a deed of the premises . . . [and] shall endorse upon each deed the time when the same will become operative in case the premises are not redeemed according to law." Mich. Comp. Laws Ann. § 600.3232. If the mortgagor "redeems the entire premises sold by paying the amount required . . . within the applicable time limit prescribed" then the "purchaser's deed is void." Id. § 600.3240(1). In the event of redemption under § 600.3240, the statute requires the deed to then be destroyed. Id. § 600.3244. On the other hand, if the property is not redeemed within the time permitted, "such deed shall thereupon become operative, and shall vest in the grantee therein named . . . all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage . . . ." Id. § 600.3236; see also Banker's Trust Co. of Detroit v. Rose, 33 N.W.2d 783, 785 (Mich. 1948) ("[L]egal title does not vest [in the bidder] at once upon the auction sale on statutory foreclosure, but only at the expiration of the period allowed for redemption.") (internal quotation marks and citations omitted). Until the redemption period from the foreclosure sale expired, the Debtor was still the owner of the Danbury Property. Therefore, the Debtor's statement contained in paragraph 3 of the Proof of Loss that identifies the Debtor as the owner of the Danbury Property was a true statement.

Second, Farm Bureau states that there was a party that did hold an interest in the Danbury Property (i.e. MERS), and thus the statement in paragraph 3 of the Proof of Loss was not true. Farm Bureau's assertion is correct. The Debtor swore that, at the time of loss, no other person or entity

had any interest therein or encumbrance thereon. But there was another person or entity that did have an interest in the Danbury Property. That entity was MERS, which had bid in at the foreclosure sale on February 26, 2003. "A purchaser of land at a sale on mortgage foreclosure acquires an equitable interest in the premises, . . . which . . . will ripen into a legal title . . . if the land is not redeemed . . . ." Gerasimos v. Continental Bank, 212 N.W. 71, 73 (Mich. 1927) (finding that, when the purchaser at a foreclosure sale subsequently conveyed his interest by quit claim deed, the interest "ripened into a legal title in his grantee" when the redemption period expired) (internal quotation marks and citation omitted). Because MERS was the successful bidder at the foreclosure sale, MERS acquired "an equitable interest" in the Danbury Property. Therefore, although it was true that the Debtor was still the owner of the Danbury Property at the time of loss, it was not true that there were no other persons or entities holding an interest in the Danbury Property.

The third statement relied upon by Farm Bureau is contained in paragraph 4 of the Proof of Loss. The Debtor swore that there had been no changes in the title, use, or possession of the Danbury Property since the Policy was issued. Farm Bureau's contention is incorrect. The Debtor's statement was true. MERS had a mortgage upon the Danbury Property at the time that the Policy was issued on February 5, 2003, and subsequently bid in at the foreclosure sale on February 26, 2003 and received a sheriff's deed. However, those actions did not effect a change in the title of the Danbury Property until the redemption period expired. The Michigan Supreme Court explained a mortgagee's interests in property when the mortgagee was the highest bidder at a foreclosure sale:

> A foreclosure of a mortgage extinguishes it. When the amount due under the mortgage is paid to the mortgagee by the purchaser at the sheriff's sale, the lien is destroyed, and the purchaser becomes the owner of an equitable interest in the mortgaged premises which ripens into legal title if not defeated by redemption as provided by law. It is not a "lien, incumbrance or mortgage" which the purchaser at a foreclosure sale acquires, but it is an interest or title, equitable in character, and

> with nothing to be done on his part to make it absolute if it is not redeemed within the period of time prescribed by law.

Gerasimos, 212 N.W. at 73 (internal quotation marks and citations omitted); see also Consolidated Mortgage Corp. v, American Security Insurance Co., 244 N.W.2d 434, 436-38 (Mich. Ct. App. 1976) (finding a change in ownership had occurred only after the redemption period had expired and distinguishing a case where a fire damaged real property before the redemption period expired) (discussing Federal National Mortgage Ass'n v. Ohio Casualty Insurance Co., 208 N.W.2d 573 (Mich. Ct. App. 1973)). Therefore, the Debtor remained the owner of the Danbury Property both at the time of the issuance of the Policy and at the time of the loss, because the redemption period had not expired when the Danbury Property was damaged by the fire, so no change in the title had occurred.

In sum, although two of the three statements relied upon by Farm Bureau in the Proof of Loss are not untrue statements, the Debtor did make one untrue statement – that there was no other person or entity holding an interest in the Danbury Property at the time of the loss. The question then becomes whether the Debtor's untrue statement constitutes grounds to void the Policy under any of clauses 3(a), (b) or (c) of the Policy.

Clause 3(a) of the Policy voids the entire Policy if there has been an intentional concealment or misrepresentation of any material fact. That MERS held an interest in the Danbury Property that would soon ripen into full legal title is a material fact. See Zine v. Chrysler Corp., 600 N.W.2d 384 (Mich. Ct. App. 1999) (finding "material" means related to an important fact). However, intent is a question of fact and "[w]hen . . . intent is at issue, 'summary judgment is particularly inappropriate.'" Hoover v. Radabaugh, 307 F.3d 460, 467 (6th Cir. 2002) (quoting Marohnic v. Walker, 800 F.2d 613, 617 (6th Cir. 1986)); see also Bernadich, 283 N.W. 5, 8 ("Whether

misrepresentations . . . void an insurance policy depends upon the intent to defraud and this is a question of fact for the jury."). The Debtor's first affidavit, made on March 30, 2005, states that he "relied upon the advice of my public adjuster as to how to fill in the form, and I have never had any intention of misleading the insurance company." The affidavit of the Debtor creates an issue of fact regarding his intent and, therefore, it precludes the entry of summary judgment for Farm Bureau under clause 3(a) of the Policy.

Clause 3(b) of the Policy provides that the Policy will be void if the insured has engaged in fraudulent conduct related to the policy or loss. Under Michigan law, fraud requires intent. See Michael v. Jones, 53 N.W.2d 342, 343 (Mich. 1952) (finding actionable fraud requires intent that a false representation be acted upon by a plaintiff). Again, based on the affidavit of the Debtor, there is clearly an issue of fact relative to the Debtor's intent and, therefore, summary judgment cannot be entered in favor of Farm Bureau with respect to clause 3(b) of the Policy.

Farm Bureau also relies on clause 3(c) of Policy. Clause 3(c) requires only that the insured have "made false statements" relating to the insurance or the loss to which the insurance applies. According to Farm Bureau, unlike clauses 3(a) and 3(b), clause 3(c) does not require any showing of intent on the part of the insured. Rather, Farm Bureau argues that clause 3(c) imposes a strict liability that automatically voids the Policy if a false statement has been submitted irrespective of whether the Debtor intended to misrepresent, mislead, or defraud Farm Bureau. According to Farm Bureau, this provision sets forth a lesser standard to void the Policy than the standards set forth in either of clauses 3(a) or (b). Farm Bureau urges the Court to interpret this language as it is written and to refrain from imposing additional elements into it. On the other hand, the Debtor argues that, notwithstanding the absence of a specific reference in clause 3(c) to intent to misrepresent, mislead

or defraud, a finding that the Policy is void under clause 3(c) can only be made under Michigan law if there is first a finding of intent. A review of Michigan case law persuades the Court that the Debtor is correct: even the language in clause 3(c) requires there to be a showing of intent on the part of the insured before the Policy may be voided.

The case of Perkins v. Century Insurance Co., 7 N.W.2d 106 (Mich. 1942) is on point. The plaintiff's residence was sold at a foreclosure sale, and a sheriff's deed issued and recorded that day, with a one-year redemption period. Id. at 107. During the redemption period, the defendant renewed two fire insurance policies on the properties. The defendant's agent, knowing of the foreclosure sale, "wrote the policies without endorsing thereon the nature of [the plaintiff's] interest." Id. On the last day of the redemption period, a fire destroyed the residence. The plaintiff sought to recover under the two policies. Evidently, the proofs of loss contained the same omission as to the plaintiff's interest in the property, because the court found that, "[i]n filling out the proofs of loss, there was an unintentional – alleged – mistake made in stating the nature of plaintiff's interest. We have held that there must be a fraudulent intent – absent here – before such a misstatement will act so as to void the policy." Id. at 108 (citing Brunswick-Balke-Collender Co. v. Northern Assurance Co., 105 N.W. 76, 79 (Mich. 1905) (holding that proof of fraudulent intent is required where policy contained a provision voiding the policy in the event of any "false swearing on the part of the insured touching any matter relating to this insurance or the subject thereof, whether before or after such loss") (citations omitted)); see also Bernadich v. Bernadich, 283 N.W. 5, 8 (Mich. 1938) (finding that "whether . . . false statements void an insurance policy depends upon the intent to defraud and this is a question of fact for the jury"); Alma State Savings Bank v. Springfield Fire & Marine Insurance Co., 256 N.W. 573, 575 (Mich. 1934) (where policy was void for false swearing, finding that "in

order to avoid the policy, the false swearing must have been done with an actual intent to defraud the insurer") (citation omitted); Campbell v. Great Lakes Insurance Co., 200 N.W. 457, 458 (Mich. 1924) (in construing insurance policy with substantially identical language, finding that "a mere misstatement based upon an erroneous estimate of value, an honest mistake, [or] an innocent overvaluation lack the essential element of fraud and do not operate to avoid the policy") (citations omitted).

This is the consistent position of Michigan courts in interpreting false swearing provisions in insurance contracts, dating back to at least 1884. See Tiefenthal v. Citizens' Mutual Fire Insurance Co., 19 N.W. 9, 10 (Mich. 1884) (holding that jury instruction, which stated that false swearing required finding that the plaintiff not only knew statements were false but also that he made them with fraudulent intent, was proper statement of the law). The Michigan Supreme Court more recently addressed this issue in West v. Farm Bureau Mutual Insurance Co., 259 N.W.2d 556 (Mich. 1997), and came to the same conclusion. The court examined a policy that provided that the "entire policy shall be void . . . in case of any . . . false swearing by the insured related thereto." Id. at 557 n.3. In analyzing whether the plaintiff's false statement voided the policy, the Michigan Supreme Court, citing Bernadich, 283 N.W. at 8, started with the "firmly established rule of construction that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer and will never be extended beyond the strict words of the policy". Id. n.5 (internal quotation marks and citations omitted). The court held that "where an insurance policy provides that an insured's concealment, misrepresentation, fraud or false swearing voids the policy, the insured must have actually intended to defraud the insurer." Id. (citations omitted)

Nevertheless, Farm Bureau urges the Court to find that the use of the language "false statement" in clause 3(c) of the Policy was specifically selected because it does not require a finding or element of intent, in contrast to clauses 3(a) and 3(b) of the Policy. The only case that Farm Bureau could point to in support of its contention that the phrase "false statement" does not require a showing of intent, is an unpublished decision of the U.S. Court of Appeals for the Sixth Circuit, Interstate Insurance Group v. Musgrove, No. 00-5181, 2001 WL 406434 (6th Cir. April 3, 2001). In that case, the Sixth Circuit Court of Appeals did hold that an insurance policy could be voided where the insured made a "false statement" relating to the insurance even without a finding of intent. Id. at *3. However, the Musgrove court specifically stated that it was applying *Kentucky law* to the policy in question. Id. at *2. Therefore, that decision has no authoritative value in interpreting the Policy under Michigan law.

Even though the phrase "false statement" used in clause 3(c) is different than the language used in clauses 3(a) or (b), and does not expressly refer to an insured's intent, it appears to the Court that Michigan law still requires a finding of intent in order to void the Policy. There are no Michigan cases that stand for the proposition that this language does not require an element of intent. Further, it seems incongruous to this Court that clause 3(a) would void the Policy based on intentional concealment or misrepresentation, but only if was a material fact, while clause 3(c) would drop the materiality requirement and still void the Policy if a statement was falsely made without any intent to mislead or defraud. To read the Policy in the manner in which Farm Bureau urges would be to essentially read clause 3(a) out of the Policy and render it superfluous because of the lesser, stricter liability standard of false statement without any intent.

Even though the Michigan decisions did not directly address the phrase "false statement" but instead dealt with policies using the phrase "false swearing," that also does not appear to the Court to be a distinction with a difference. "False statement" is defined as "[a]n untrue statement knowingly made with the intent to mislead." Black's Law Dictionary at 619 (7th ed. 1999). That definition certainly contains an element of intent.

Further, Mich. Comp. Laws Ann. § 500.2833 directs what provisions shall be contained in a fire insurance policy in Michigan. That statute provides that a "fire insurance policy issued or delivered in this state shall contain" a provision "[t]hat the policy may be void on the basis of misrepresentation, fraud, or concealment." Id. § 500.2833(1)(c). The statute says nothing about a provision authorizing the insurer to void a policy based simply upon an untrue statement absent a showing of intent. Although the statute does not recite on its face that it precludes the use of other provisions not specifically enumerated in the statute, a fair reading of the statute suggests that the Michigan legislature has required insurers to utilize provisions that void policies because of misrepresentations, fraud, or concealment where there is clearly an element of intent, but did not choose to require a provision that would void a policy on a strict liability basis where there is an untrue statement but no showing of intent to misrepresent, mislead, or defraud. While the application of Mich. Comp. Laws Ann. § 500.2833 is not dispositive to this Court, the Court's reading of it is consistent with the case law in Michigan, which uniformly requires a showing of intent.

The Court holds that clause 3(c) of the Policy, like clauses 3(a) and (b), requires a showing of intent to misrepresent, mislead, or defraud on the part of the Debtor before the Policy can be voided, even though the Court finds that the Debtor's statement that no other entities held an interest

in the Danbury Property was not a true statement. The Court concludes that there is a genuine issue of fact regarding the Debtor's intent in making such statement and, therefore, summary judgment must be denied. The Court will enter its own order consistent with this opinion.

_____
PHILLIP J. SHEFFERLY
U.S. BANKRUPTCY JUDGE

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